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U. S. Supreme Court, U. S.
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IN THE
Supreme Court of the United States

October Term, 1945.

No. 601

Elizabeth C. Lownsbury, Mrs. Evelyn H. Brantley, Richard C. Hassinger, William H. Hassinger, Mrs. Virginia H. Lange, Mrs. Leonora McCrossin, Robert Ingalls, Robert Ingalls, Jr., Ellen Gregg Ingalls, Ingalls Iron Works Company, Henry R. Howze, Alfred J. Snyder, and The First National Bank of Birmingham as: Agent for Kate Porter Lewis, Agent for Hugh Kaul, Agent for Virginia Kaul Greene, Trustee for Crawford T. Johnson, Jr., Trustee of Estate of Nathan L. Miller, Trustee of Estate of Charles B. Patrick, Trustee for Mrs. Virginia E. Hassinger, Trustee for Virginia H. Lange, Trustee for Mrs. Leonora H. McCrossin, Trustee for Mrs. Evelyn H. Brantley, Trustee for Mrs. Lucile H. Cabaniss, Trustee for William H. Hassinger, Trustee for Richard C. Hassinger, Trustee for Hugh Kaul, Trustee for Mrs. Roy Head Kaul, Trustee for Mrs. Virginia Kaul Greene, Executor of Estate of Lafayette R. Hanna and Executor of Estate of Crawford T. Johnson,

Petitioners,

v.

Securities and Exchange Commission
and
The Commonwealth and Southern Corporation,

Respondents.

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE THIRD CIRCUIT, AND BRIEF IN
SUPPORT THEREOF.**

ALFRED J. SNYDER,
WILLIAM H. BRANTLEY, JR.,
ELIZABETH C. LOWNSBURY,
Attorneys for the Petitioners.



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IN THE
Supreme Court of the United States.

October Term, 1945.

No. _____

ELIZABETH C. LOWNSBURY, MRS. EVELYN H. BRANTLEY,
RICHARD C. HASSINGER, WILLIAM H. HASSINGER, MRS.
VIRGINIA H. LANGE, MRS. LEONORA MCCROSSIN, ROBERT
INGALLS, ROBERT INGALLS, JR., ELLEN GREGG INGALLS,
INGALLS IRON WORKS COMPANY, HENRY R. HOWZE,
ALFRED J. SNYDER, and THE FIRST NATIONAL BANK OF
BIRMINGHAM as: Agent for Kate Porter Lewis, Agent
for Hugh Kaul, Agent for Virginia Kaul Greene, Trust-
tee for Crawford T. Johnson, Jr., Trustee of Estate
of Nathan L. Miller, Trustee of Estate of Charles B.
Patrick, Trustee for Mrs. Virginia E. Hassinger, Trust-
tee for Virginia H. Lange, Trustee for Mrs. Leonora
H. McCrossin, Trustee for Mrs. Evelyn H. Brantley,
Trustee for Mrs. Lucile H. Cabaniss, Trustee for Wil-
liam H. Hassinger, Trustee for Richard C. Hassinger,
Trustee for Hugh Kaul, Trustee for Mrs. Roy Head
Kaul, Trustee for Mrs. Virginia Kaul Greene, Ex-
ecutor of Estate of Lafayette R. Hanna and Executor
of Estate of Crawford T. Johnson,

Petitioners,

v.

SECURITIES AND EXCHANGE COMMISSION

and

THE COMMONWEALTH AND SOUTHERN CORPORATION,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE THIRD CIRCUIT.

*To the Honorable, the Chief Justice of the United States
and the Associate Justices of the Supreme Court of
the United States:*

The petitioners, Elizabeth C. Lownsbury, Mrs. Evelyn H. Brantley, Richard C. Hassinger, William H. Hassinger, Mrs. Virginia H. Lange, Mrs. Leonora McCrossin, Robert Ingalls, Robert Ingalls, Jr., Ellen Gregg Ingalls, Ingalls Iron Works Company, Henry R. Howze, Alfred J. Snyder, and The First National Bank of Birmingham as: Agent for Kate Porter Lewis, Agent for Hugh Kaul, Agent for Virginia Kaul Greene, Trustee for Crawford T. Johnson, Jr., Trustee of Estate of Nathan L. Miller, Trustee of Estate of Charles B. Patrick, Trustee for Mrs. Virginia E. Hassinger, Trustee for Virginia H. Lange, Trustee for Mrs. Leonora H. McCrossin, Trustee for Mrs. Evelyn H. Brantley, Trustee for Mrs. Lucile H. Cabaniss, Trustee for William H. Hassinger, Trustee for Richard C. Hassinger, Trustee for Hugh Kaul, Trustee for Mrs. Roy Head Kaul, Trustee for Mrs. Virginia Kaul Greene, Executor of Estate of Lafayette R. Hanna and Executor of Estate of Crawford T. Johnson, pray that a writ of certiorari issue to the United States Circuit Court of Appeals, for the Third Circuit, to review the judgment of that Court, entered in the above entitled cause, on September 11, 1945, dismissing the Petition of Review and denying a stay of proceedings pending a review by that court.

Jurisdiction.

The jurisdiction of this Court is invoked under Section 24 of the Public Utility Holding Company Act of 1935 (49 Stat. 803, 834-5; 15 U. S. C. Sec. 79x) and Section 240 (a) of the Judicial Code, as amended (28 U. S. C. Sec. 347 (a)).

The Opinions Below.

The opinion of the Circuit Court of Appeals for the Third Circuit (R. 66-76) was rendered on September 11, 1945, and is not yet reported. On October 2, 1945, that Court handed down an order denying petitioner's application for rehearing (R. 86).

The opinion of the Securities and Exchange Commission (hereinafter referred to as the Commission), rendered May 31, 1945, the order of the Commission of June 30, 1945, and the order of the Commission of July 18, 1945, refusing a rehearing thereon, have not been officially reported. The opinion of the Commission is contained in its Holding Company Act Release No. 5825, the order of June 30, 1945, in its Release No. 5895 and the order of July 18, 1945, in its Release No. 5942.

Statute Involved.

The statute involved is the Public Utility Holding Company Act of 1935 (49 Stat. 803, 15 U. S. C. Sec. 79, hereinafter referred to as the "Act"). The portions of that act which are involved are (1) Section 24, which is set forth in full as an appendix to the brief annexed hereto; the portion thereof directly involved reads as follows:

"Sec. 24 (a) Any person or party aggrieved by an order issued by the Commission under this title may obtain a review of such order in the circuit court of appeals of the United States within any circuit wherein such person resides or has his principal place of business or in the United States Court of Appeals for the District of Columbia, by filing in such Court, within sixty days after the entry of such order, a written petition praying that the order of the Commission be modified or set aside in whole or in part. * * *"

Also (2) Section 11, which is attached as Appendix B to the Petition for Review (R. 50-56). The subsections there-

of which are directly involved are a portion of subsection 11 (b) (2), which reads as follows:

“Any order made under this subsection shall be subject to judicial review as provided in section 24.”

And subsection 11 (e) which is set forth in full in Appendix B of the Petition for Review (R. 53-54).

Summary Statement.

The petitioners are individual stockholders, of Commonwealth and Southern Corporation, hereinafter referred to as Commonwealth, against which Corporation the orders of the Commission are directed. The petitioners own 328,597 shares of common stock and 179,387 option warrants, of Commonwealth (R. 2). All the petitioners were stockholders of Commonwealth prior to the beginning of the proceedings, and many of the petitioners obtained their securities by exchange for the securities of the underlying companies at the time of the formation of Commonwealth (1929-1930) (R. 5-6).

Commonwealth registered as a holding company under the provisions of the Public Utility Holding Company Act of 1935. It owns all the common stock of all its ten subsidiary operating companies, and no stock in any other public utility company. Its issued capital consists of 33,673,328 shares of common stock, without par value, representing an aggregate stated value of \$168,366,640.29, or \$5.00 per share (the value of Commonwealth's investments having been written down by \$596,372,086.02 in 1933), and 1,482,000 shares of \$6.00 cumulative preferred stock without par value, represented by an aggregate stated capital of \$148,200,000. Commonwealth has approximately 175,000 stockholders of which 160,000 are holders of the common stock and these holders are literally scattered all over the world.

The Commission instituted integration proceedings under Section 11 (b) (1) of the Act and recapitalization pro-

ceedings under Section 11 (b) (2) of the Act, and on April 9, 1942, issued an order thereon against Commonwealth. Thereafter Commonwealth sought review in the Circuit Court of Appeals, Third Circuit, which Court affirmed the order of the Commission and denied the right of Commonwealth as a corporation to raise certain constitutional objections relative to the alteration of the rights of its stockholders on the basis that Commonwealth, as a corporation was not injured thereby, indicating such objections could only be raised by stockholders, when and if their rights were affected by a plan of recapitalization. (See: Commonwealth and Southern Corporation v. Securities and Exchange Commission, 134 Fed. 2nd 747.) The stockholders were sent no notice of the proceedings to this point (R. 8).

On May 8, 1943, the Commission sent notice to the stockholders of hearings, with respect to a plan filed by the Company pursuant to Section 11 (e) for compliance with Sections 11 (b) (1) and 11 (b) (2) of the Act, and consolidated the proceedings under all these Sections (R. 65).

The plan of recapitalization submitted by the management of Commonwealth briefly proposed to give the preferred stockholders 80% of the assets of Commonwealth in lieu of their present rights and to give the common stockholders only 20% of the assets in lieu of their present rights (R. 9-10). This plan gave approximately half as much to the common stockholders as a plan previously filed, upon which the Commission failed or refused to act (R. 8).

The petitioners sought to intervene as parties, but were permitted only limited participation in the hearings (R. 10), which extended from June 7, 1943, off and on, until March 27, 1944 (R. 11). During the course of the hearings there was a continuance of nearly six months, in which time a preferred stockholder's committee negotiated with officials and representatives of United Corporation, American Superpower Corporation, United Gas Improvement Company, and other corporate financial interests, and pro-

duced a plan which would give the common stockholders only 15%, instead of the proposed 20%, and give 85% to the preferred stockholders. The staff of the Commission, or members of the Commission, gave their opinion that the proposed plan would be acceptable to the Commission and they advised the officials of Commonwealth accordingly, with the result that Commonwealth withdrew the 80%-20% plan and adopted the 85%-15% plan. All the negotiations, conferences and communications between the parties, the staff of the Commission and with the officials of Commonwealth were ex-parte, in the absence of these petitioners and their counsel (R. 11-13). When hearings were resumed on March 23, 1944, after nearly six months adjournment counsel for the Commission and the examiner arbitrarily cut off cross-examination, sought to terminate the hearings and succeeded in bringing the hearings to an end, without permitting these petitioners a reasonable opportunity to cross-examine witnesses and prepare and introduce evidence (R. 13).

On June 30, 1945, the Commission handed down an order approving the 85%-15% plan, embodied therein by reference "Findings and Opinion" previously filed May 31, 1945 (R. 15), which findings were not supported by substantial evidence, dismissed exceptions filed by the petitioners, refused the petitioner's request to intervene as parties, and found the 85%-15% plan to be "fair and equitable." The order further provided for the issuance of securities in accordance with the plan, upon approval of a majority of stockholders at a meeting to be held to vote thereon (R. 16). The petitioners filed with the Commission a petition for rehearing (R. 16), and also a request for a stay of proceedings pending the exercise of the right of review provided by Section 24 of the Act (R. 16-17). These requests were refused by the Commission's order of July 18, 1945 (R. 17).

On August 8, 1945, within 60 days of the said orders, the petitioners, being persons aggrieved within the mean-

ing of the Act, filed a Petition for Review under Section 24 of the Act in the United States Circuit Court of Appeals, for the Third Circuit, under number 9015, seeking review of the Commission's order of June 30, 1945, and the order of July 18, 1945, refusing a rehearing and stay of proceedings. The Petition was brought on behalf of themselves and on behalf of all other holders of similar securities who might desire to join.

Briefly, the petition set forth: I. The orders are based upon arbitrary administration of the Act without a full and fair hearing and contra to due process of law (R. 18-22). II. The orders are based upon findings which are not supported by substantial evidence (R. 22-25). III. The orders approve a plan of recapitalization which is not fair and equitable to the common stockholders or to the holders of the option warrants (R. 26-28). IV. The orders are not authorized by the Act or, if authorized, are not within any power of Congress (R. 28-29). V. The orders directly impair the obligations of the contract of incorporation and deprive the petitioners of property rights without due process of law in violation of the Fifth Amendment (R. 29-32). VI. The orders construe powers of Congress in a manner as to deny rights retained by the people, or reserved to the States, in violation of the Ninth and Tenth Amendments to the Constitution (R. 32-33). VII. That economic and political conditions and taxation and fiscal policies of the government are so uncertain at the present time as to render the orders arbitrary. The petition requested a review of the orders of June 30, 1945, and July 18, 1945, that they be set aside and requested a stay of proceedings (R. 35).

The petitioners also filed with the Circuit Court a petition for stay of proceedings, pending a review on the merits (R. 58-62).

On August 13, 1945, the Commission filed a motion to dismiss the petitioner's petition for review on the ground that the plan of reorganization approved by the order of

June 30, 1945, was filed under subsection 11 (e) and was expressly conditioned upon stockholders approval and upon enforcement by a United States District Court, which conditions had not yet been met (R. 63-64). The petitioners opposed this motion at the hearing, held August 13, 1945, and contended that the order approving the plan was not conditional, but final, although the ultimate consummation and enforcement of the plan was conditional, and that the only Court with jurisdiction under the Act to review the order of the Commission and to grant the petitioners the relief provided in Section 24 of the Act is the Circuit Court of Appeals.

On September 11, 1944, the Circuit Court rendered its opinion granting the motion of the Commission to dismiss the petition for review and denying the request for a stay of proceedings (R. 66-76).

The Question Presented.

Are the petitioners, as stockholders in Commonwealth, entitled to a review in the Circuit Court of Appeals, under Section 24 of the Act, of orders of the Commission, issued as a result of consolidated proceedings under Sections 11 (b) (1), 11 (b) (2) and 11 (e) of the Act, approving a plan of reorganization for Commonwealth which alters their rights as stockholders, where the plan was filed under Section 11 (e) for compliance with Sections 11 (b) (1) and 11 (b) (2)?

Specification of Errors to Be Urged.

1. The Circuit Court of Appeals for the Third Circuit erred in refusing to review the orders of the Commission, as provided by Section 24 of the Public Utility Holding Company Act.

2. The Circuit Court of Appeals for the Third Circuit erred in refusing to grant a stay of proceedings, under Section 24 (b) of the Act, pending a review of the orders of the Commission.

Reasons Relied On For the Allowance of the Writ.

1. This case presents a federal question of great importance which has not been, but should be, settled by this court.

The petitioners are substantial holders of stock in Commonwealth. The orders of the Commission approve a plan for the reorganization of Commonwealth which the petitioners believe directly and adversely affects their property interests in Commonwealth. The question involved affects the interests of 175,000 stockholders of Commonwealth; 160,000 of which, are common stockholders, having similar interests to the petitioners. The financial interests of the petitioners, based upon the stated value of their stock on the books of the Company, is in excess of \$1,500,000. The question involved likewise affects the interests of investors in holding companies other than Commonwealth, numbering in the millions, and effects property interests running into billions of dollars invested in the securities of these companies.

The petitioners believe Congress intended, by Section 24 of the Act, to grant to such investors a clear right of review of any order of the Commission which might affect their interests. The forum for such review is stated in Section 24 as the Circuit Court of the Circuit wherein the person resides. This forum, the petitioners believe, was designated to make a review convenient to the person or party aggrieved. In this case, the forum is also convenient to the Commission, since the Commission and several of the petitioners are all located in the Third Circuit.

The question, which seriously involves the administration of the Act, is whether the Commission or the Company, can by the device of filing a plan of reorganization under subsection 11 (e), for compliance with the provisions of Section 11 (b), circumvent a review on the merits, as clearly intended by Congress, namely, in the Circuit Court in the circuit wherein the person aggrieved resides, and thus by

so doing shift the forum to a District Court in another state, which Court is not only inconvenient, but has only limited authority in the matter. The jurisdiction of the District Court is only to "approve or disapprove" the plan. (See: *In re Laeledge Gas Light Co.* (D. C. Mo. 1944, 57 F. Supp. 997). The Circuit Court has "exclusive jurisdiction to affirm, modify or set aside such order in whole or in part" (sec. 24 (a)).

In a prior proceeding, the Circuit Court, Third Circuit held that Commonwealth, as a corporation, did not have the right to raise numerous constitutional objections relative to the alteration of the property rights of its stockholders *inter se*. (See: *The Commonwealth & Southern Corporation v. Securities and Exchange Commission*, 134 F. 2d 747). Thus the burden of protecting their own property rights was placed squarely upon the stockholders themselves. Now that same Circuit Court has refused the petitioners, as stockholders, the right to a review of orders which refused them the right to intervene as parties and approved a plan which would deprive them of property rights. The Circuit Court has upheld the contentions of the Commission to the effect that the "device" of having the plan filed under subsection 11 (e) circumvents the right of review under Section 24. If this is the law, then the Commission will have succeeded in accomplishing a situation in which the corporation cannot defend the rights of its stockholders nor can the stockholders themselves have a complete review of proceedings which affect their property rights. Such a situation necessitates a determination of the proper procedure by which the Act is to be administered and the opportunity which is to be afforded stockholders to protect their property rights.

(2) The Circuit Court has decided a federal question in a way probably in conflict with applicable decisions of this court.

There has been no direct decision on the particular contention raised by the Commission in this case, but the peti-

tioners believe the Supreme Court intended to settle this and all similar questions relative to the right of all stockholders to a review by its opinion in the matters of *American Power and Light Company v. Securities and Exchange Commission* and *Securities and Exchange Commission v. Okin*, 65 S. Ct. 1254. Those cases decided that a stockholder was a person "aggrieved" within the meaning of Section 24 of the Act, hence was entitled to a review.

A question somewhat similar to the present question was presented in the matter of *Okin v. Securities and Exchange Commission*, 65 S. Ct. 1569, which was a petition for writ of certiorari to the Circuit Court for the Second Circuit. That case differed from the present case in that the Commission had already instituted proceedings in the District Court before the review was brought in the Circuit Court. In the present case the review was brought in the Circuit Court before any proceedings in the District Court. In the *Okin* case the Circuit Court dismissed the petition for review and the Supreme Court "vacated" the judgment of the Circuit Court. Nevertheless the Circuit Court for the Third Circuit, in the present case, has relied upon the judgment of the Circuit Court of the Second Circuit in the *Okin* case, as its authority for dismissing the petitioner's petition for review, despite the fact that judgment was "vacated".

There have been no decisions of this Court refusing a stockholder a right of review under Section 24, as the Circuit Court has done in the present case.

(3) The Circuit Court in refusing a review of orders of the commission has departed from the accepted and usual course of judicial proceedings.

Until the recent *Okin* cases (*Securities and Exchange Commission v. Okin*, and *Okin v. Securities and Exchange Commission*, *supra*), there appears to have been no question of the right of a stockholder, or any person aggrieved, to a review under section 24 of an order by the Commission.

This Court in deciding the case of Securities and Exchange Commission v. Okin, in both the majority opinion and the dissenting opinion, cited numerous cases in which the Circuit Courts reviewed the orders of the Commission, both at the instance of the Companies involved and their stockholders. The following is a partial list of the cases therein cited as authority for the right of review:

Lawless v. Securities and Exchange Commission, 1 Cir. 105 F. 2d 574; Todd v. Securities and Exchange Commission, 6 Cir. 137 F. 2d 475; Securities and Exchange Commission v. Chernery Corporation, 318 U. S. 80, 63 S. Ct. 454; New York Trust Company v. Securities and Exchange Commission, 2 Cir. 131 F. 2d 274; City National Bank and Trust Company v. Securities and Exchange Commission, 7 Cir. 134 F. 2d 65 and L. J. Maquis and Company v. Securities and Exchange Commission, 3 Cir. 134 2d 822.

In every one of the above cited cases the matter sought to be reviewed related to a plan filed under subsection 11 (e), which is the "device" the Commission now contends circumvents the right of review in the Circuit Court under Section 24. It should be noted that in L. J. Maquis & Company v. Securities and Exchange Commission, the Circuit Court which entertained jurisdiction on review was the Third Circuit, which in the present case has refused jurisdiction. In that case the Commission itself selected the forum by filing its transcript in the Third Circuit rather than in the Second Circuit.

As the administration of the Act has now reached the stage where the rights of stockholders are being affected, the Commission is apparently attempting to change the accepted procedure to circumvent the clear right of a complete review on the merits, under Section 24 in the Circuit wherein the party resides. If the Commission succeeds it will make it more difficult and inconvenient for the stockholder to protect his rights, and also prevent certain phases of the matter, which would be considered on complete review, from ever being determined.

Conclusion.

It is respectfully submitted that a writ of certiorari be granted.

ELIZABETH C. LOWNSBURY,
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